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No. 225

In the Supreme Court of the United States

October Term, 1948

Max A. Nissen, a Corporation, and Abraham Mosoharsh, Petitioners

v.

United States of America

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 228

NYE & NISSEN, A CORPORATION, AND ABRAHAM MONCHARSH, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Appeals (R. 4602–4628) is reported at 168 F. 2d 846.

JURISDICTION

The judgment of the Court of Appeals was entered June 21, 1948 (R. 4628–4629), and a petition for rehearing was denied July 22, 1948 (R. 4629). The petition for a writ of certiorari was filed August 17, 1948, and was granted October 25, 1948 (R. 4631). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended (now 28 U. S. C. 1254 (1)). See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the evidence is sufficient to sustain the conviction of petitioner Moncharsh on the substantive counts, charging the presentation of false invoices to an agency of the United States, as an aider or abettor in the commission of those offenses.

2. Whether the jury was properly permitted to consider, as evidence of the intent with which the offenses charged in the substantive counts were committed, proof of similar offenses occurring at about the same time and showing a consistent pattern of conduct.

3. Whether there is a fatal variance between the allegations and the proof in respect of the conspiracy count.[1]

STATUTES INVOLVED

Section 35 of the Criminal Code, as amended, 52 Stat. 197 (18 U. S. C. 80, 1946 ed.), provided:

> Sec. 35 (A). Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by

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[1] The petition for certiorari (p. 3) also raised the question "Whether the conspiracy count was duplicitous in that a conspiracy to defraud the inspection system of the War Shipping Administration and the Army and Navy was alleged to have commenced on January 1, 1938, whereas the War Shipping Administration was not created until February 7, 1942." This question is not discussed in petitioners' brief on the merits and appears to have been abandoned. In any event, the point is clearly without merit. See Br. in Opp., pp. 17–18, footnote 6.

any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; or whoever shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry in any matter within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder * * * shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

Section 37 of the Criminal Code (18 U. S. C. 88, 1946 ed.) provided:

Conspiring to commit offense against United States.—If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of

> the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

Section 332 of the Criminal Code (18 U. S. C. 550, 1946 ed.) provided:

> "*Principals" defined.*—Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.

STATEMENT

On June 20, 1945,[2] an indictment in seven counts (R. 2–26) was filed in the United States District Court for the Northern District of California against Nye & Nissen, the corporate petitioner, Abraham Moncharsh, the individual petitioner, and three other individual defendants, Henry Berman, Ruby Goddard, and Edward Menges.

The first count (R. 2–10) charged these defendants with having conspired to defraud the United States, in violation of Section 37 of the Criminal Code, *supra* (now 18 U. S. C. 371 [1948 revision]), the conspiracy allegedly having lasted from about January 1, 1938, to the date of the indictment's return. The gist of the alleged fraudulent scheme consisted of "grading, weigh-

[2] The date of the filing of the indictment is given in the record as "June 20, 1946" (R. 26), but this is a typographical error (see R. 38, 40, 241).

ing, packing, selling, and delivering" inferior butter, cheese, and eggs to "the United States of America—War Shipping Administration, War Department, and Navy Department" "through frauds and deceptions practiced upon" government inspectors (R. 4–5), "impeding, impairing, obstructing, and defeating" the governmental functions of inspecting, grading, and weighing such products (R. 5), and "circumventing and avoiding the standards, grades, weights, and specifications" to which purchases of such products were subject "by means of false and fictitious inspection, grading, and weighing; by the prevention of honest and accurate inspection, grading, and weighing by said [inspectors]; and by other tricks, schemes, devices, and concealments in the manner and by the means hereinafter set forth" (R. 5). Included among such "tricks" and "schemes" alleged to have been "part of the plan and conspiracy" (R. 5–8) was the charge that the defendants misrepresented the products sold to the United States, in respect of their grades, weights, and prices (R. 7, 8). Five overt acts in furtherance of the conspiracy were alleged (R. 8–10).

The remaining six counts (counts 2 to 7, R. 10–26) charged the same defendants with substantive violations of Section 35 of the Criminal Code, *supra*, pp. 2–3 (now, in pertinent part, 18 U. S. C. 1001 [1948 revision]), by knowingly misrepresenting, in invoices presented to the War Ship-

ping Administration in connection with specific sales of eggs and cheese during the months of April and May, 1944, the weights, grades, and prices of those products.

Following a trial by jury, petitioners and two of their co-defendants, Berman and Goddard, were found guilty on all counts; the third co-defendant, Menges, was acquitted (R. 72–73). Petitioner Nye & Nissen was sentenced to pay a fine of $5,000 on each count, or a total of $35,000 (R. 77–78). Petitioner Moncharsh was sentenced to two years' imprisonment on the first count and to five years' imprisonment on each of the other six counts, all seven terms to run concurrently, and, in addition, was fined $5,000 on each count, or a total of $35,000 (R. 79–80). Berman and Goddard were each sentenced to imprisonment for one year and a day on each count, the terms to run concurrently, and a total fine of $700 (R. 76). Berman and Goddard did not appeal. On appeal by petitioners alone, the judgments of conviction on all counts were affirmed by the Court of Appeals for the Ninth Circuit (R. 4628–4629).

The evidence adduced by the Government may be summarized as follows:

Nye & Nissen, the corporate petitioner, was engaged in the business of purchasing and selling eggs, butter, and cheese during the years covered by the indictment, with its principal place of business in San Francisco, California (R. 353–354). Petitioner Moncharsh was president of the

corporation throughout the period covered by the indictment, i. e., from January 1, 1938, to June 20, 1945 (R. 354). He was also a director of the corporation, and had a one-third interest in Baum & Moncharsh, a holding company having sole ownership of Nye & Nissen (R. 4037–4038). Moncharsh's mother, who died in December 1945, also owned a one-third interest; the remaining third was owned by Baum, who lived in New York and came to the West Coast only occasionally (R. 4116, 4121). Berman and Goddard are Moncharsh's brothers-in-law (R. 4122, 4124). Berman was employed in various capacities by a subsidiary of Nye & Nissen, and ultimately became the city sales manager of Nye & Nissen; his headquarters were at Nye & Nissen's main plant in San Francisco, where he had charge of the company's retail salesmen (R. 3395–3397). Goddard was Nye & Nissen's shipping and receiving clerk (R. 3885).

During the period from 1938 through 1944, Nye & Nissen made numerous large sales of its products to the Army and the Navy. After December 1943, it also sold large quantities of its products to numerous vessels operated by various shipping companies having general agency contracts with the War Shipping Administration, an agency of the Government (R. 4603).

The existence of the conspiracy to defraud the Government, as charged in the first count of the indictment, and the complicity of petitioner Moncharsh as well as of Berman and Goddard in it,

were established by an overwhelming mass of evidence. The record, covering more than 4,000 pages of testimony, is replete with evidence of fraudulent practices committed by the defendants pursuant to a common scheme and plan to foist inferior products on the Government. The following incidents are typical of the many to be found in the record:

On one occasion in 1941 (R. 482), pursuant to instructions of Moncharsh and Goddard, the egg-candlers in the employ of Nye & Nissen were told to prepare an order of eggs to be sold to the Army by placing Grade A eggs, or "samples,"[3] as they were called, in certain cases, and eggs of inferior grades, called "cut-outs," in separate cases (R. 465–466). The cases of Grade A eggs were given an identifying mark, consisting of a small circle around one of the nails in each case, so that the Nye & Nissen employees would later be able to distinguish them from the cases of "cut-outs" (R. 484–485). When the Army inspector called to inspect the order, it was arranged that he should inspect none but the cases containing

[3] The term "samples" and "cut-outs" appear throughout the record in reference to eggs sold by Nye & Nissen. "Samples" was the expression used by Nye & Nissen employees to refer to eggs whose grade and weight were such that they could pass government inspection; "cut-outs" referred to inferior or undersize eggs which could not pass inspection, but which, by all sorts of devious means, Nye & Nissen attempted (and often succeeded) in passing off as acceptable eggs (see, for example, R. 466, 467–468, 483, 821–822, 3252).

the "sample" eggs (R. 492–498). Being so deceived, the inspector approved the whole order (R. 499–500). The scheme to deceive consisted in part of having the inspector inspect the same "sample" cases more than once (R. 497–498). The entire testimony concerning this particular incident extends from R. 462 to R. 500.

On another occasion in 1941, a lot of fresh eggs was placed outside the candling room for inspection by an Army inspector. The inspector selected at random certain of these cases, which were taken into the candling room and examined by him. While this was being done, the remainder of the eggs were removed and inferior cold storage eggs were substituted, under Goddard's supervision. After the inspector had candled and approved the eggs which he had designated, he came out of the candling room and, on the assumption that the eggs there were of the same grade as those he had inspected, placed his stamp of approval on the whole lot. (R. 785–807). Moncharsh was not present during this switching process, but he had been present earlier when the original lot of fresh eggs was being prepared, and had instructed the employees "to do a good job because [the Army inspector] would be coming out on that order" (R. 805–806). Three or four days later, the inspector came back to inspect another Army order, and the same lot of fresh eggs which had previously been sampled and approved was again submitted to him. In the same

manner as before, storage eggs were substituted for the fresh eggs from which the inspector had selected certain cases for examination. This process was repeated several times. In all, the inspector inspected the same lot of eggs five or six times. (R. 810–812.)

Once in 1938, following rejection by the Army of a certain order of eggs, Moncharsh questioned Nix, an employee, concerning the rejection. Nix said to Moncharsh, "We used these same egg samples for a long time and they are old as the hills." Moncharsh replied in a jocular tone, "You can't go by eggs, don't forget on wine the older it gets the better it is." This testimony was objected to, but was admitted on the ground that it tended to show Moncharsh's knowledge of the fact that inspection of the same eggs had been made over and over again. (R. 840–842.)

One of the Army inspectors who used to come to the Nye & Nissen plant to inspect Army orders of eggs, Colonel Kielsmeier,[4] used to indicate which cases he desired to examine in the candling room by placing a purple ink-mark on

[4] The witness Pineda mentioned numerous incidents involving deception practiced upon an Army inspector whom he referred to as "Colonel Foster." Pineda subsequently testified that the man whom he had been referring to previously in the trial as Colonel Foster was actually Colonel Kielsmeier (R. 1295–1296). Pineda had always had the mistaken impression that Kielsmeier's name was Foster. See R. 1305–1306 for his explanation of the origin of the mistaken impression.

the cases with a stencilling brush. If these selected samples met the specifications of the order, he would then authorize the entire lot to be approved by stamping them "approved." The cases marked by Kielsmeier for sampling which happened to contain acceptable eggs would be given to him in the candling room to be candled, but those he marked which contained inferior eggs (identifiable as such by the employees of Nye & Nissen by the type of cover on the case or by some small identifying mark) were withheld, and other cases, containing "sample" eggs, were substituted for them. In order to deceive Kielsmeier, it was necessary to place a purple ink-mark on the substituted cases similar to the mark he had placed on the cases he desired to inspect. In 1939, Goddard procured a brush and ink similar to Kielsmeier's for this purpose. (R. 816–824.) Previous to the purchase of this brush and ink, the method of deception consisted of physically removing the labels (bearing the purple ink-marks) on all cases containing inferior eggs which Kielsmeier might have chanced to select for candling, and transferring them to "sample" cases. T...s system proved too slow and cumbersome, however, and for that reason the simpler method of deception just described was adopted. (R. 824–828.)

On one occasion in the latter part of 1939, while Kielsmeier was in the candling room examining cases of eggs selected by him from a

large order for spot-checking, he stationed an assistant, a sergeant, outside the candling room to keep a watch on the main lot of eggs from which samples had been selected for examination. Since this interfered with the process of substituting "samples" for "cut-outs," as previously described, Goddard resorted to a ruse—consisting of asking the sergeant to go outside and move his car—in order to get rid of him temporarily (R. 828–830). Several days later, when the sergeant was stationed to guard another lot of eggs, Goddard got rid of him for the short time required for the egg-switching process by inviting him upstairs for a drink (R. 830–832).

On another occasion early in 1942, Pineda, Nix, and Smiley delivered a load of eggs to a Navy pier. Moncharsh and Goddard were present at the loading of the truck. This load consisted, in part, of cases of eggs bearing the Department of Agriculture stamp of approval and, in part, of cases not so stamped. Pineda and Nix hid in the truck behind the cases because they did not have passes to get past the sentry at the pier. At the pier the cases were unloaded and stacked in such a way that the stamped cases were on top and on the outside, while the unstamped cases were on the bottom and in the center of the lot, where they could not be easily noticed (R. 832–838).

Once during the summer of 1940 Berman and four other Nye & Nissen employees—Pineda,

Andrade, Nix, and Smiley—were unloading an order of eggs at Pier 16, San Francisco. Some of the cases contained "samples," being identifiable as such by the fact that certain stencil marks on the cases were "kitty-cornered." The cases containing inferior eggs bore "parallel" stencilling. The cases were stacked on the dock in such a way that the "sample" cases were on top and the inferior eggs on the bottom. Smiley was the driver of the truck which brought the cases to the dock, and he handed the cases down to the others. At one point Andrade "got on top of the truck and wanted to help Smiley," but Moncharsh, who had arrived at the scene some time after the unloading commenced, told Andrade "to get off the truck, that was Smiley's truck, and he knew where the cases were." Andrade, accordingly, "got off and Smiley kept giving us the cases the way he was at the beginning." Later, Moncharsh told Andrade to take Pineda back to the plant when the unloading was finished and leave Nix to "take care of the inspectors." (R. 777–780.)

From 1935 to 1939, Goddard and other employees of Nye & Nissen used a counterfeit stamp, similar to an official Department of Agriculture stamp, for the purpose of stamping cases which had not been inspected and which contained inferior eggs (R. 843–851). This stamp was retained in the custody of Goddard, who kept it in

a wooden box "upstairs in the main office," i. e., Moncharsh's office (R. 846, 848–849). Pineda, the employee-witness who told about the counterfeit stamp, testified that he had seen it used in the fraudulent manner described "forty or fifty times" (R. 851), but never in the presence of a government inspector (R. 846). Once, while Goddard was using the stamp, he had Pineda "stand outside and make sure no one came down while he stamped cases of eggs"; Goddard was warned of some one's approach, and he "placed the stamp down [and] took a look," but immediately "picked up the stamp and put it in his pocket," saying, "It doesn't pay to leave this around" (R. 850).

Another employee, Andrade, testified to seeing petitioner Moncharsh using this stamp. On this occasion, Moncharsh was surprised by the sudden return of a Department of Agriculture inspector who had just left, and Moncharsh "hurried and stuck [the stamp] in his pocket." Jack Smith, vice-president of Nye & Nissen, who was present at the incident, later said to Moncharsh, "Abe, if you don't cut this kind of business out you are going to get all of us in the penitentiary." According to Andrade's testimony, Moncharsh replied, "What is the matter with you guys? Are you afraid? These guys don't know nothing anyhow." (R. 3258–3259.)

On one occasion in 1941, in the presence of Moncharsh, Berman, and Goddard, the eggs in

cases which had been inspected and approved by government inspectors were removed and inferior "cut-outs" were substituted (R. 892–895). Moncharsh and Berman helped in the transfer process for a while, but they "sort of kept bumping into each other, so they stopped and helped us put the covers on" (R. 894).

The employee-witness Pineda described an incident in 1941 when he, Goddard, Berman, and other employees broke the wiring binding cases of eggs destined for the Army which had received the stamp of approval, removed the eggs from the cases, substituted inferior "cut-outs," and then re-wired the cases for delivery. Moncharsh "gave us a hand" with the work. (R. 896–898.) In the rewiring process, the impressions left on the cases by the original wire were sometimes detectable. Pineda also related an incident in January 1940, when Goddard told him that "they had been caught red-handed on some cases of eggs that were delivered and inspected by the Army," and that he, Pineda, would have to go to a certain cold-storage plant, where the eggs were located, and "give them [Goddard and other employees] a hand." Moncharsh was present at the conversation. Accordingly, Pineda, Goddard, Berman, and Jack Smith, the vice-president of Nye & Nissen, went to the cold-storage plant. When they arrived, "The Army men were inspecting cases of eggs and were pretty angry." Smith stayed outside and engaged the

Army inspectors in conversation while Goddard and Pineda went inside and attempted to scuff off the impressions left by the original wire with their shoes. Despite their efforts, from 125 to 150 cases of the 1,000-case order were rejected. Goddard subsequently boasted to Pineda, "You should have seen all the cases they didn't inspect." (R. 898–902.)

In connection with the grading, weighing, stamping, and inspection of butter, Pineda described an occasion in February of 1942 when butter was being inspected by an Army inspector named Colonel Hand. He stated that eight or ten thousand pounds of butter were involved in this transaction. Colonel Hand and his inspectors scored the butter by examining one sixty-pound cube of every churn, and upon this inspection certain churn numbers were rejected and set apart; those that were accepted were taken out of the cooler and brought to the butter-cutting room. The butter was cut the following day. Colonel Hand arrived at about 8 o'clock in the morning, but before that time, under instructions from Goddard, the employees had cut a quantity of the rejected butter. After the arrival of the inspectors the butter was cut in their presence, but whenever they were not in the immediate vicinity of the butter-cutting machine Pineda, again under instructions from Goddard, cut the butter short weight by one ounce per pound. This was done by manipu-

lating a handle on the butter-cutting machine. This whole process was completely described by Pineda, who gave the details of the method whereby the inspectors were deceived and the manner in which inferior butter and short weights were foisted upon the Army inspectors (R. 903-915).

Once in 1939, the Army inspector, Colonel Kielsmeier, had rejected a truckload of eggs purchased from Nye & Nissen. The truck driver, Andrade, called the office and informed Moncharsh of the fact of the rejection. According to Andrade, Moncharsh asked "if there was any possible way that I could pass the load." (R. 3248.) When Andrade replied in the negative, Moncharsh told him to bring the load back to the warehouse, but to be sure that no Army car was around before backing in. Andrade brought the eggs back, and Moncharsh "pulled the stakes off the truck before I hardly even got off the truck," and proceeded to candle the eggs in one of the "sample" cases in the load. (R. 3248-3249.) Later, Colonel Kielsmeier arrived, that Moncharsh told him that "They were beautiful eggs, he couldn't see why he rejected the eggs," but Kielsmeier advised Moncharsh that "he didn't want them eggs. He didn't want them kind of eggs delivered out to the post any time when he was holding inspections." After Kielsmeier left, Goddard asked Moncharsh "what to do with the load," and Moncharsh gave orders

that the "two sample cases" on the rejected load be replaced by two "new samples," but that otherwise the same load be redelivered. (R. 3250.) To minimize the chances that Colonel Kielsmeier would again be on hand to inspect the load, however, Moncharsh directed that delivery be delayed until "after two or two-thirty," by which time Kielsmeier would probably have left the Army base. Accordingly, Andrade again delivered the "same eggs with a difference of two cases." (R. 3251.) It does not appear whether or not the stratagem succeeded.

Another employee of Nye & Nissen, Ranson, who worked for the company from late in 1943 to May of 1944, testified that he delivered a load of eggs to the Matson Navigation Company in May 1944. Goddard designated the eggs to be loaded on to the truck. The eggs came from two lots, one bearing the Department of Agriculture stamp of approval, and the other bearing no government stamp, but merely "a large purple 'P'."[5] Goddard told Ranson to "take these [unstamped] eggs and mix them in once in a while with the other eggs off the flat [i. e., the stamped eggs]." Ranson did as ordered, and noticed that the unstamped eggs were lighter in weight than the others, and told Goddard that "the cases seemed light" and that he "didn't feel like delivering

[5] Cases stamped with this "P" contained "peewee" eggs—i. e., eggs smaller than the standard size "small" (see R. 2477-2480).

the load." Goddard told him "It is all right. Go ahead and load those." (R. 1393–1396.) This load of eggs was destined for the S. S. *Cape Breton*, a ship operated by the Matson Company under a general agency contract with the War Shipping Administration (cf. R. 1398 with R. 1370–1371). This practice of mixing cases of "peewee" eggs in with larger eggs, upon instructions of Goddard or Berman, and delivering the mixed lot to ships operated by companies acting as agents of the War Shipping Administration was a common practice at that time (see R. 2452–2454, 2456–2458, 2467–2474).

For other examples of fraudulent and deceptive practices similar to those described in the preceding pages, see R. 838–840, 882–884, 884–888, 888–891, 3182–3188, 3221–3226, 3228–3234, 3234–3244, 3244–3247, 4289–4292.

Additional evidence from which the jury could infer that petitioner Moncharsh not only was well aware of the fraudulent practices carried out by his subordinates but actually ordered and supervised such practices is to be found in Pineda's testimony that Moncharsh had "general supervision of all the operations of the plant," so that "if anything went wrong or anything had to be done, he was the man to give the final word. * * * He would come down and tell us what to do, or tell Ruby [Goddard] what to do. Sometimes Ruby wasn't around. If we was doing something wrong, he would correct us." (R. 446).

Moncharsh admitted to agents Magee and Johnson of the F. B. I. in September 1944 that he was personally familiar with the type and quality of "all eggs sold and delivered out of Nye & Nissen's plant in San Francisco," that he "was familiar with the grading of all eggs sold to the Government from that plant," and that he "personally dictated all the policies of Nye & Nissen and regulated and decided the daily prices on their products" (R. 4338–4340, 4346–4347).

The continuance of the fraudulent practices of Nye & Nissen through the years 1943 and 1944 was established, not only by the evidence adduced in relation to the substantive counts (see pp. 22–30, *infra*), but also by numerous other witnesses who gave testimony, often picturesque in its detail, attesting to the inferiority of the products, particularly eggs, which Nye & Nissen delivered to merchant ships operated under agency contracts with the War Shipping Administration. A few examples of such testimony will be given here.

Brown, chief cook on the S. S. *William S. Clark,* which took aboard a large order of Nye & Nissen eggs preparatory to a voyage in October 1943 (R. 1717), testified that many of the eggs were "very, very, very bad. * * * Rotten. To be frank with you, rotten" (R. 1723). The odor from some of them, he said, "would run you out of there" (*ibid.*). "Some I could use and some I couldn't, and they got so bad I just give up the sponge, told them I was going to get off"

(*ibid.*). Foster, an assistant cook on this vessel, corroborated Brown in similarly descriptive language (R. 1828–1830).

Mahoney, saloon messman on the S. S. *John Muir,* which purchased Nye & Nissen eggs for a voyage in May 1944 (R. 1642), similarly testified that a great many of the eggs were rotten, and that he had to throw away large quantities of them (R. 1653–1656).

Debes, chief steward on the S. S. *Hawaiian Shipper,* which stored Nye & Nissen eggs for a voyage in December 1944 (R. 1497–1498), testified not only that a great many of the eggs were inedible (R. 1518–1523), but that many of the cases had one and sometimes two missing "layers," there being three dozen eggs to the layer (R. 1521–1522). Whereas on the previous voyages he had received no complaints about the eggs, Debes testified, he received constant complaints on this voyage from the chief cook, the chief baker, the crew, and the troop passengers (R. 1541). Oscarsson, the chief baker on this voyage (R. 1543), testified that he was able to get on the average only three to ten good eggs out of each "layer" of three dozen (R. 1549), that some eggs "were coal black inside" (R. 1551), and that by using "quite a few bum eggs in my baking," he managed to use about two-thirds of the eggs (R. 1552). Dolyn, the chief cook (R. 1589), similarly testified to the large proportion of inedible eggs and also testified that even with respect to the

usable eggs he had to resort to scrambling them and "doping them up with mace and nutmeg" (R. 1594–1596). Both Oscarsson and Dolyn also corroborated Debes' testimony relating to the large number of missing eggs (R. 1552, 1593).

Each of the six substantive counts (counts 2 to 7, R. 10–26) related to a specific delivery of eggs or eggs and cheese by Nye & Nissen to a vessel operated by a private shipping company under a general agency contract with the War Shipping Administration. Each count, after making the formal allegations setting forth the agency contract, the assignment of the particular vessel in question to the shipping company pursuant to this contract, and the fact that the supplies in question were sold to the shipping company for the account of the United States, described a particular invoice that had been submitted by Nye & Nissen to the War Shipping Administration, covering the products involved in the particular sale. Each count then charged that the invoice was false and known to be so by the defendants, in that the products were of a lower grade or weight, or both, and hence of lower price, than were represented in the invoice.

The substantive offenses charged were all committed during the months of April and May 1944. The evidence of the falsity of the invoices was secured by actual examination and inspection of the eggs and cheese at the time of or immediately after delivery to the ships. This was ac-

complished by agents of the Federal Bureau of Investigation with the assistance of Army experts and without the knowledge of the defendants. The procedure of the investigating officers was as follows: They secured the cooperation of Nystrom, a truck driver for Nye & Nissen, who informed the F. B. I. when he was about to make a delivery to the waterfront. Thereupon, one or both of the F. B. I. agents, Magee and Johnson, went to the ship receiving the goods, and took with them an officer of the Army Veterinary Corps who was skilled in the inspection of eggs by candling. These officers were Major Milton Evans and Lieutenant-Colonel Pearl Hand. At the ship in each instance they secured from the ship's steward his copy of the Nye & Nissen invoice which accompanied the products, and thereupon the Army officer examined the eggs by candling and weighing sufficient samples to determine the grade and size of the whole lot. Where cheese was involved, it was weighed. In every instance it was found that the eggs were far inferior in grade or size or both to the eggs described in the invoice, and that in some instances they were so deficient as to be entitled to no grade whatever and hence unsalable under War Shipping Administration regulations. Similarly, the cheese was found to be of lesser weight than the Government was billed for. (R. 548–603, 2642–2722, 2855–2907, 2985–3035.)

Nystrom, the truck driver who cooperated with the government officials in establishing the proof of guilt on the substantive counts, was in the employ of Nye & Nissen from January 1944 until about May of the same year (R. 2450). During this period he made two or three deliveries a day of butter, eggs, and cheese to ships at the waterfront (R. 2450–2451). His instructions all came from either Berman or Goddard, who told him what articles to load on his truck and where to deliver them and gave him the invoices which accompanied the deliveries (R. 2451–2488, 2491–2531).

Inasmuch as petitioners do not challenge the sufficiency of the proof of the falsity of the invoices involved in the substantive counts, no useful purpose would be served by summarizing the details of the evidence in respect of all the substantive counts. The following summary of the evidence relating to the falsity of the invoice involved in the first substantive count (count 2) is typical of the evidence respecting the others:[6]

The invoice involved in count 2 (Ex. 94, R. 1456), dated April 29, 1944, was addressed to

[6] The exhibit numbers of the false invoices involved in the other substantive counts, and the names of the ships to which the supplies covered by the invoices were delivered, are as follows: Count 3, Ex. 153, S. S. *Mission San Diego;* count 4, Ex. 102, S. S. *Francis W. Parker;* count 5, Ex. 144, S. S. *Gilbert Hitchcock;* count 6, Ex. 151, S. S. *Czechoslovakia Victory;* count 7, Ex. 53, S. S. *Henry White.* All these deliveries were made early in May 1944. All exhibits in the case have been lodged with the Clerk of this Court.

"USA, WSA, Agwilines, Interocean S. S. Co., General Agents." It called for delivery to the S. S. *Cape Charles*, at Pier 18, San Francisco, of three cases of Cheddar cheese, consisting of 240 pounds at $0.287 per pound, or a total of $68.88; 36 cases of "medium processed AA" eggs, consisting of 1,080 dozen at $0.41 per dozen, or a total of $442.80; and in addition a quantity of butter (R. 2502–2503).

Nystrom loaded his truck for this shipment on April 29, 1944, under the supervision of Berman, who gave him several copies of the invoice which, with the shipment, were delivered to the ship at Pier 18. On his return to the plant, he handed Berman the receipt showing delivery (R. 2501–2504). At the time of this delivery he notified the F. B. I. agents that he was making the delivery (R. 2494), and on the same day agents Magee and Johnson, accompanied by Major Evans, went aboard the ship (R. 2994). They found the products involved in this shipment on board, and proceeded to examine them (R. 2995–2996).

Agent Johnson weighed the cheese and found that it weighed only 149 pounds, or 91 pounds less than the invoice weight (R. 2995).

Of the 36 cases of eggs, 32 bore the Department of Agriculture inspection stamp and four cases bore no stamp. Samples of the eggs were candled by Major Evans in a dark room arranged in a shelter on deck. In this examination he

candled and weighed three unstamped cases and one stamped case and weighed an additional stamped case. The results of his inspection were as follows:

Case 1 (unstamped): Contained 41% grade AA; 35% Grade A; 16% Grade B; 2% Grade C; 2% Small Blood Spots; 3% Checks; and 1% Inedibles. Owing to the inedible eggs, the case could be given no grade whatever, but eliminating consideration of the inedibles, the case as a whole would have been entitled to a B grade. Net weight of this case was 34 pounds, 14 ounces, which brought the eggs barely within the classification of U. S. Small, being 5 pounds, 2 ounces short of the weight required for U. S. Medium.

Case 2 (unstamped): Contained 14% Grade AA; 36% Grade A; 35% Grade B; 12% Grade C; and 3% Inedibles. Entitled to no grade on account of the inedibles; otherwise, they would grade U. S. Consumer Grade B. Net weight was 33 pounds, 4 ounces, which was below any weight classification recognized by the Department of Agriculture; generally referred to as "peewees" in the trade.

Case 3 (unstamped): Contained 44% Grade AA; 33% Grade A; 18% Grade B; 3% Grade C; and 2% Checks. The case as a whole graded U. S. Consumer Grade B. Net weight was 33 pounds, 10 ounces, which likewise classified them as "peewees."

Case 4 (stamped): Contained 73% Grade

AA; 21% Grade A; 4% grade B; 1% Small Blood Spots; and 1% Checks. The case as a whole graded Grade A. (Witness not questioned as to the weight of this case.)

Case 5 (stamped): Not candled. Weighed 40 pounds, 4 ounces, which classified them as Mediums. (R. 2647–2657.)

In addition to establishing the filing of the false invoices described in the six substantive counts of the indictment, the Government presented evidence that on eleven other occasions similar false invoices were submitted by Nye & Nissen to the War Shipping Administration in connection with deliveries of eggs and cheese to eleven other vessels operated by various shipping companies pursuant to general agency contracts. Nine of these deliveries were made during the same April-May period in 1944 in which the deliveries involved in the substantive counts were made. The vessels to which these nine deliveries were made, and the exhibit numbers of the invoices involved, were the S. S. *Cape Breton* (Ex. 81), S. S. *Cape Cumberland* (Ex. 140), S. S. *John Muir* (Ex. 65), S. S. *Josiah Royce* (Ex. 61), S. S. *Cape Pillar* (Ex. 57), S. S. *Phillipa* (Ex. 84), S. S. *William A. Coulter* (Ex. 169), S. S. *Heber M. Creel* (Ex. 164), and S. S. *James Oliver* (Ex. 147). Of the other two deliveries, one was made in October 1943 to the S. S. *William S. Clark* (Ex. 112), and the other, in December 1944, to the S. S. *Hawaiian Shipper* (Ex. 87). The

evidence in respect of the deliveries to these eleven ships and the falsity of the invoice in each case was at first received solely as evidence of the conspiracy charged in the first count and as overt acts in furtherance of the conspiracy, but after both sides had completed the presentation of their evidence the court granted a motion of the Government to admit the proof of all but one[7] of these eleven other offenses as evidence relating to the substantive counts as well, on the theory that they were similar offenses tending to show the criminal intent with which the particular false invoices involved in those counts were presented to a government agency (R. 3342–3343, 4354–4355).

Miss Trini Robles, an employee of Nye & Nissen, testified for the Government that since January 1943 her duties had included, among others, the work of typing all Nye & Nissen invoices to its customers (R. 3156–3157). She made up the invoices from "handbills," or order forms, which had been filled out by either Berman or

[7] The Government's motion specifically excluded the evidence relating to the delivery to the S. S. *Hawaiian Shipper*, on the ground that that delivery, made in December 1944, occurred too long after the deliveries to the six ships described in the substantive counts to come within the principle that evidence of similar offenses committed at about the same time as those charged are admissible as showing the intent with which the offenses charged were committed. (R. 3342–3343, 4354–4355). Consequently, the proof relating to the S. S. *Hawaiian Shipper* was received only as evidence of the conspiracy and as an overt act in furtherance of it.

Goddard, whichever of the two happened to have taken the particular order (R. 3159, 3165–3166). The "handbills" contained descriptions of the products ordered, the quantities of each, and the unit prices, and she would "extend" the prices in typing the invoices, i. e., multiply the quantity in each instance by the unit price to arrive at the total price (R. 3162–3163). After performing the necessary mathematical calculations and typing the invoices (an original and several carbon copies in each instance), she would sign the original and have some one else in the office check her "extensions" for accuracy (R. 3160–3161, 3163). She would then deliver the invoices to either Berman or Goddard, whichever of the two had handled the order (R. 3160, 3177). Miss Robles identified each of the invoices involved in the substantive counts, as well as each of the invoices which accompanied the deliveries to the eleven vessels referred to at pp. 27–29, *supra*, but which were not charged in the indictment as having been falsified, as having been typed and handled by her in the manner described (R. 3162–3176). When a delivery of goods was made to a vessel, she testified, one carbon copy of the invoice would be delivered to the steward of the ship, and the original invoice was mailed by Nye & Nissen to the steamship company which operated the vessel (R. 3167–3177). Miss Robles further testified that there were "about ten of us" working in

the office where she typed the invoices, including an "office manager," who was her immediate supervisor, a "traffic manager," an auditor, and the vice-president of the company, Jack Smith (R. 3157–3158). The president of the company, petitioner Moncharsh, was also in the office, she stated, and it was he who had "charge of the business of the company there in that office" (R. 3158).

SUMMARY OF ARGUMENT

I. There was ample evidence warranting the jury in finding that petitioner Moncharsh aided and abetted the commission of the substantive offenses charged in the indictment—presenting false invoices to an agency of the Government. The trial judge properly instructed the jury that it could convict Moncharsh on the substantive counts if it found that he abetted or procured the commission of the substantive offenses. The judgment of conviction was, therefore, entirely proper.

Moncharsh contends that the Court of Appeals affirmed his conviction of the substantive offenses on an erroneous application of the rule of liability established in *Pinkerton* v. *United States*, 328 U. S. 640. His contention is that the court below did not sustain his conviction on the basis on which the issue of his guilt was submitted to the jury, i. e., as an aider and abettor. It appears, although the matter is not entirely free from doubt, that the Court of Appeals relied upon the *Pinkerton*

case only as permitting participation in a conspiracy, in furtherance of which substantive crimes are committed, to be regarded as *evidence* of aiding and abetting the commission of such crimes. This is a proper application of the *Pinkerton* case. In any event, the judgment below was correct, even though it may possibly have rested on a doubtful ground, and should be affirmed.

2. It is well settled that evidence of offenses other than, but similar in character to, those charged is admissible to show the intent, motive or guilty knowledge with which the offenses charged were committed, or to show a common plan or design. This was the basis on which offenses not charged in the indictment, but of a similar nature, were admitted in evidence against the defendants here. Since the jury could properly have found from the evidence that petitioner Moncharsh abetted and procured the commission of the substantive offenses charged, the admission of proof of the other offenses of similar nature, for the limited purpose indicated, was clearly correct.

3. The fact that the evidence included proof of joint action not only in evasion of the Army's and Navy's food inspection systems from 1938 to 1942, but also in fraud of the War Shipping Administration in 1943 and 1944 by billing that agency for goods of higher quality and price than were actually delivered, does not show that there were two "separate and distinct" conspiracies.

The conspiracy charged and proved was a single, continuing one, lasting from 1938 to 1945, "to defraud the United States." The defendants employed various means of accomplishing the conspiracy, but the conspiracy itself was essentially unitary in nature and purpose.

ARGUMENT

I

PETITIONER MONCHARSH WAS PROPERLY CONVICTED AS AN AIDER AND ABETTOR IN THE COMMISSION OF THE SUBSTANTIVE OFFENSES

Petitioner Moncharsh raises no question in this Court as to the sufficiency of the evidence to support his conviction of the offense charged in the first count of the indictment, namely, that he conspired with others to defraud the United States in the manner alleged (R. 2–10). His main contention here is that the Court of Appeals affirmed on improper grounds his conviction of the substantive offenses charged in counts 2 to 7 of the indictment, namely, defrauding the United States through submission of false and fraudulent invoices to the War Shipping Administration.

In Point A, we argue that Moncharsh's conviction as an aider and abettor on the substantive counts was supported by the evidence; that the trial court did not err in its instructions to the jury; and that the judgment of conviction entered by the district court against Moncharsh on these counts was entirely proper in all respects, and

hence entitled to the affirmance which it received from the Court of Appeals. In Point B, we discuss the contention that the Court of Appeals predicated its affirmance on improper grounds.

A. THE ISSUE OF MONCHARSH'S GUILT AS AN AIDER AND ABETTOR ON THE SUBSTANTIVE COUNTS WAS PROPERLY SUBMITTED TO THE JURY, AND THE EVIDENCE AMPLY SUSTAINS THE VERDICT

The last six counts of the indictment (counts 2 to 7, R. 10–26) charged Moncharsh and his co-defendants with the commission of substantive offenses in violation of Section 35 of the Criminal Code, as amended, 18 U. S. C. 80 (1946 ed.), now substantially incorporated in 18 U. S. C. 1001 (1948 revision). The statute provided, in pertinent part, as follows:

> Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to * * * any department [of the United States], * * * any claim upon or against the Government of the United States, or any department or officer thereof, * * * knowing such claim to be false, fictitious, or fraudulent; or whoever shall knowingly and wilfully * * * make or cause to be made any false or fraudulent statements or representations, or * * * any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry in any matter within the jurisdiction of any department or agency of the United States * * *, shall be fined not

more than $10,000, or imprisoned not more than ten years, or both."

Each of the six substantive counts charged, in substance, that at a specified time and place the defendant corporation, Nye & Nissen, sold and delivered a specified quantity of eggs, or eggs and cheese, to a vessel operated under assignment from the War Shipping Administration, an agency of the United States; that these supplies were purchased for the account of the United States; and that the defendants knowingly and wilfully submitted false invoices for such supplies, containing statements and entries which were fraudulent and fictitious in that the products delivered were of a lower grade or weight, or both, and hence of a lower price than represented and billed for in such invoices (R. 10–26).

The Government fully established the formal allegations of each count, and the sufficiency of the proof that the invoices were false and were submitted by Nye & Nissen to an agency of the

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[8] Section 1001 of the present Criminal Code, as revised by Public Law 772, 80th Congress, 2d sess., approved June 25, 1948, provides:

"Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

United States, the War Shipping Administration, in a matter within its jurisdiction, is not disputed here. What is challenged is the sufficiency of the evidence to support Moncharsh's conviction as a principal in the commission of such offenses. With reference to these counts, the trial court instructed the jury as follows (R. 4366, 4368):

> I instruct you in connection with counts two to seven, inclusive, that the mere fact that one is an officer or employee of a corporation does not render him criminally responsible for the acts of other officers, agents or employees of the corporation, unless the evidence establishes beyond a reasonable doubt not only that he knew of such acts but that he actually participated or aided in the performance of the same with the specific intent to defraud and deceive in the manner alleged in the indictment.
>
> * * * * *
>
> In determining whether each of the defendants made or used these invoices, or caused them to be made or used, it is not required that you find that each defendant saw or handled the invoices or were present when they were made. One who aids, abets, counsels, commands, induces, or procures the commission of an act is as responsible for that act as if he committed it directly. Consequently, if you find that one or more of the defendants aided, induced, or otherwise procured the making or using of these invoices, then you must

find that they caused them to be made or used within the meaning of the statute."

Petitioners have not contended, here or in the lower courts, that these instructions were incorrect or did not adequately apprise the jury of the applicable principles of law. The court gave, in essence, the familiar aider-and-abettor charge, in accordance with Section 332 of the Criminal Code, 18 U. S. C. 550 (1946 ed.), which provided: "Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal."

We submit that the jury was amply warranted by the evidence in finding Moncharsh guilty on the substantive counts under these instructions. To be sure, the proof did not show that he directly or personally participated in the actual preparation or submission of the six false invoices involved in these counts. There was no evidence that Moncharsh himself saw, handled, or had specific knowledge of any of these invoices. But no such direct and specific proof was required in order to hold him responsible as an aider and abettor.

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[9] At another point in the charge, the trial court stated (R. 4363): "For one person to abet another person in the commission of a criminal offense, simply means, to knowingly and with criminal intent aid, promote, encourage or instigate, by act or counsel, or by both act and counsel, the commission of such criminal offense."

The general nature and scope of the aider-and-abettor concept has been illuminatingly summarized in Judge Learned Hand's opinion in *United States* v. *Peoni*, 100 F. 2d 401 (C. A. 2). Reviewing the development and classic formulations of the doctrine, embodied in 18 U. S. C. 550 (1946 ed.), that he who aids, abets, or counsels another to commit a crime is equally guilty as a principal, Judge Hand concluded (p. 402):

> It will be observed that all these definitions * * * demand that he [the accessory] in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed. All the words used—even the most colorless, "abet"—carry an implication of purposive attitude towards it.

And in a later case, *United States* v. *Falcone*, 109 F. 2d 579 (C. A. 2), affirmed, 311 U. S. 205, Judge Hand stated (p. 581):

> * * * There are indeed instances of criminal liability of the same kind, where the law imposes punishment merely because the accused did not forbear to do that from which the wrong was likely to follow; but in prosecutions for conspiracy or abetting, his attitude towards the forbidden undertaking must be more positive. It is not enough that he does not forego a normally lawful activity, of the fruits of which he knows that others will make an unlawful use; he must in some sense promote their

venture himself, make it his own, have a stake in its outcome.

The applicability of these general considerations to the present case is readily apparent: an inference of aiding and abetting can properly be drawn by the jury where the evidence shows that the accused has in some way associated himself with the criminal venture in furtherance of its objects, and particularly where he has a stake in its outcome. If there is evidence of conduct manifesting a "positive" or "purposive" attitude towards the enterprise, aiding and abetting is sufficiently proved. An illustration is *United States* v. *Johnson*, 319 U. S. 503, 518. In that case Johnson was indicted and convicted of attempting to evade his income taxes, in violation of Section 145 (b) of the Internal Revenue Code, in that he filed false returns for each of the tax years involved. His co-defendants, who were charged as aiders and abettors, moved for directed verdicts on the ground that there was no evidence that they participated in any way in the actual preparation or filing of Johnson's returns. The Circuit Court of Appeals held that this motion should have been granted, but this Court reversed. It ruled that the co-defendants could be held as aiders and abettors, notwithstanding the lack of proof that they actually shared in the making and filing of the false returns, if the evidence showed that they "consciously were parties" to Johnson's scheme for attempted evasion of his income tax liability.

(319 U. S. 503, 518.) Accord: *Boyd* v. *United States*, 142 U. S. 450, 456; *Wood* v. *United States*, 204 Fed. 55, 58 (C. A. 4); *Reid* v. *United States*, 44 F. 2d 51 (C. A. 7); *Cardinal* v. *United States*, 50 F. 2d 166, 170 (C. A. 8); *Johnson* v. *United States*, 62 F. 2d 32, 34 (C. A. 9).

Similarly, in the case at bar, it was not necessary to show that Moncharsh directly and personally participated in the filing of the false invoices. The substantive offenses with which he was charged consisted of the presentation of false claims against the United States, in violation of 18 U. S. C. 80 (1946 ed.); and his guilt as an aider and abettor was sufficiently shown by the evidence as to his leading and responsible role in the fradulent course of conduct (of which the filing of false invoices with the War Shipping Administration was an integral part) in which, as the proof established, he, the corporation, and the other convicted defendants were jointly engaged.

Moncharsh was the president and a director of, and owner of a one-third interest in, the Nye & Nissen corporation; his mother, who died in 1945, also owned a one-third interest, and the remaining third was owned by Baum, who lived in New York and only rarely visited the West Coast. Moncharsh was thus the only partner on the spot, actively in charge of Nye & Nissen's day-to-day operations. His leading role in the elaborate scheme to defraud the Government, which the jury found, was estab-

lished by an overwhelming array of evidence (see Statement, *supra*, pp. 7–22, 30). That evidence, covering more than 4,000 pages of testimony, leaves no doubt that he was not only a party to the conspiracy but was its principal figure, the moving spirit who actively supervised and directed the fraudulent activities of his subordinates, including the egg-candlers, the butter-cutters, the truck drivers, and other minor employees, as well as the two more responsible but still subordinate, officials, Berman and Goddard, his brother-in-law, who were indicted and convicted with him.

Pineda, a former employee, testified (R. 446), that Moncharsh had "general supervision of all the operations of the plant," and that "if anything went wrong or anything had to be done, he was the man to give the final word. * * * He would come down and tell us what to do, or tell Ruby [Goddard] what to do. Sometimes Ruby wasn't around. If we was doing something wrong, he would correct us." According to the testimony of the two F. B. I. agents who interviewed Moncharsh in September 1944, several months after the period covered by the substantive counts, Moncharsh admitted that he was personally familiar with the type and quality of "all eggs sold and delivered out of Nye & Nissen's plant in San Francisco," that he "was familiar with the grading of all eggs sold to the Government from that plant," and

that he "personally dictated all the policies of Nye & Nissen and regulated and decided the daily prices on their products" (R. 4338–4340, 4346–4347).

Moncharsh's activities were not limited, as his brief implies (page 7), to "executive problems." The evidence showed that he was frequently down on the floor of the plant, giving Berman and Goddard instructions about the make-up of orders and sometimes even giving a hand with such detailed and routine activities as physically transferring eggs from one case to another, stamping, nailing, wiring cases, and the like (*supra*, pp. 8–18).

The fraudulent representations contained in the invoices involved in the substantive counts were not isolated phenomena, entirely insulated from the other frauds on the Government with which Moncharsh was directly connected; they were essential pieces in the whole mosaic of fraud shown by the evidence. Every government order, whether it was destined for the Army, the Navy, or a War Shipping Administration vessel, had to be accompanied by an invoice, and it was obviously necessary for Nye & Nissen to falsify these invoices in order successfully to carry out the scheme. The falsification of every invoice accompanying a delivery of goods which were inferior to those ordered was shown to be an essential, integral part of the plan as a whole. The conspiracy count of the indictment charged that the misrepresentation of the grades, weights,

and prices of eggs, butter, and cheese was "part of the plan and conspiracy" alleged (R. 7–8), and the proof fully sustained this charge.

That the invoices involved in the substantive counts related to deliveries to ships operated under the authority of the War Shipping Administration, while the fraudulent activities with which Moncharsh was directly and specifically linked concerned evasions of the inspection systems of the Army and Navy at an earlier period of time, has no controlling significance. The jury could properly conclude, from the mass of evidence adduced, that the presentation of false invoices and the evasion of the inspection systems were interrelated parts of a single scheme to defraud the Government. Every act of misconduct on the part of the defendants, as the Court of Appeals observed (R. 4615), "was germane to one consistent and persistent course of wrongdoing."

We have here, then, a situation where a single, continuing criminal venture was shown by the evidence—a venture which, from its inception in 1938 to its termination in 1945, had as its dominating and pervasive purpose the defrauding of the Government by all available deceptive practices. Evasion of the governmental system of pre-delivery inspection of goods by every type of deceit that ingenuity could devise and the concomitant falsification of invoices, without which the deceits practiced on Government inspectors

would have failed in their purpose, were the twin major devices for perpetrating the fraud.

Moncharsh was shown by overwhelming evidence to have been the "senior partner" in this enterprise, directing, supervising, guiding and controlling the operations of his fellow conspirators. The evidence directly showing Moncharsh's personal participation in criminal activities related, for the most part, to the years from 1938 through 1942; but the conspiracy was shown to have been still in existence throughout the years 1943 and 1944. The evidence showed that the subordinate co-conspirators actively and directly participated in the fraudulent enterprise during those years. These subordinate members of the conspiracy were shown still to be engaging in the specific activity of evading and defeating inspection of deliveries of goods during the later period (*supra*, pp. 18–19), the same general type of activity with which they and Moncharsh together were shown to have been associated during the earlier period. Specific proof of presenting false invoices during the later period was adduced, and the subordinate conspirators were directly connected with the preparation and presentation of these invoices (*supra*, pp. 22–30). The submission of false invoices was also going on, obviously, during the earlier period as well, since that activity, as the proof showed, was essential to effectuation of the scheme to defraud.

Moncharsh was not shown by the defense to

have repudiated his role in the illegal venture at any time. On the contrary, during the entire period here involved from 1938 to 1945, he continued in his position as company president, director, and substantial owner (R. 4037–4038). In fact, his office was located in the very office where the false invoices were made out, and he had complete charge of all the affairs in that office (*supra*, pp. 29–30). We submit that, in these circumstances, it is absurd to suggest that the jury could not reasonably infer that Moncharsh had knowledge of, and was responsible for, the falsification of these invoices in 1943 and 1944. Beyond that, the jury could have concluded that these acts were done at his instigation and direction, just as all the other fraudulent activities of his subordinates were carried out under his supervision. The jury was amply warranted in finding, as the admittedly correct instructions of the trial court permitted it to find, that Moncharsh aided and abetted the falsification of the invoices involved in the substantive counts, and consequently in finding him guilty as a principal on those counts. For, once a person is shown to have joined a criminal enterprise and, in that role, to have directed and supervised the illegal activities embraced within its objects, a jury is at liberty to infer that he continues to play his part in the enterprise until, by some affirmative act of repudiation, he withdraws from it. *Hyde*

v. *United States*, 225 U. S. 347, 369; *Pinkerton* v. *United States*, 328 U. S. 640, 646.

It is well settled that the responsible managers of a corporation which has engaged in an unlawful course of conduct may be held criminally liable for the acts of subordinates done in furtherance of the illicit enterprise, regardless of whether these directors or officers personally supervised the particular acts done or were personally present at the time and place of the commission of these acts. *United States* v. *Dotterweich*, 320 U. S. 277, 281–285; *Carolene Products Co.* v. *United States*, 140 F. 2d 61, 66 (C. A. 4), affirmed, 323 U. S. 18; *United States* v. *Bach*, 151 F. 2d 177, 179 (C. A. 7); *United States* v. *MacAndrews & Forbes Co.*, 149 Fed. 823, 832 (C. C. S. D. N. Y.), writ of error dismissed, 212 U. S. 585. In a leading English case, *Rex* v. *Medley*, 6 Car. & Payne 292, 297, the directors of a company were charged with criminal responsibility for the water pollution caused by the acts of the company's superintendent and other subordinate officials. The directors claimed that they were ignorant of the acts done since they went but rarely to the company's plant and never interfered in the actual management. In rejecting this plea, Denman, C. J., instructed the jury as follows:

> It is said that the directors were ignorant of what had been done. In my judg-

> ment that makes no difference; provided you think that they gave authority to Leadbetter [the superintendent] to conduct the works, they will be answerable.

Similarly, in *People* v. *White Lead Works*, 82 Mich. 471, 479, 46 N. W. 735, 737, the president and treasurer-manager of a lead works were fined for a nuisance committed by the company, on the theory that they were "jointly responsible for the business." The court said:

> It is not necessary to conviction that they should have been actually engaged in work upon the premises. The work is carried on by employees. The directors and officers are the persons primarily responsible, and therefore the proper ones to be prosecuted.

The following cases provide further illustrations of the principle that a corporate officer or director through whose act or omission the corporation commits a crime, or who by virtue of his managerial position or other similar relation to the misconduct can be deemed responsible for its commission, is himself guilty as an aider or abettor of, or accessory to, the crime: *City of Wyandotte* v. *Corrigan*, 35 Kan. 21, 26 (doing business without a license); *Crall* v. *Commonwealth*, 103 Va. 855, 859 (same); *Overland Cotton Mill Co.* v. *People*, 32 Colo. 263 (violation of child labor laws); *State* v. *Ross*, 55 Ore. 450 (larceny or embezzlement on behalf of corporation); *State* v.

Thomas, 123 Wash. 299 (same); *Milbrath* v. *State*, 138 Wis. 354 (same); *State* v. *Cooley*, 141 Tenn. 33 (same); *Patterson* v. *United States*, 222 Fed. 599 (C. A. 6), certiorari denied, 238 U. S. 635 (violation of Sherman Act); *United States* v. *Winslow*, 195 Fed. 578, 581 (D. Mass.) (same); *State* v. *Burnam*, 71 Wash. 199 (violation of pure food laws); *State* v. *Brown*, 151 Minn. 340, 343 (same).

This principle of criminal liability is, as this Court indicated in the *Dotterweich* case, 320 U. S. at 281, merely a recognition of the fact that the only way in which a corporation can act is through the individuals who act in its behalf. *New York Central & Hudson River R. R. Co.* v. *United States*, 212 U. S. 481. And this Court went on to hold that 18 U. S. C. 550 (1946 ed.) has given general application to the historic doctrine that all those responsible for a crime are equally guilty (320 U. S. at 284):

> The offense is committed * * * by all who do have such a responsible share in the furtherance of the transaction which the statute outlaws * * *.

This rule has particular application in the present case where, as the evidence showed, Moncharsh was not an absentee owner and director. He was the active manager of Nye & Nissen, and primarily responsible for its policies and operations. Here, as in *Bozza* v. *United States*, 330 U. S. 160, 165, the members of the jury could properly

draw on their own experiences and observations" and "were not precluded from drawing inferences as to fraudulent purposes from these circumstances, nor were they compelled to believe that this petitioner was oblivious of the purposes of what went on around him."

The district court properly instructed the jury, in connection with the substantive counts, that Moncharsh could not be held responsible for the acts of other officers, agents or employees of the corporation, "unless the evidence establishes beyond a reasonable doubt not only that he knew of such acts but that he actually participated or aided in the performance of the same with the specific intent to defraud and deceive in the manner alleged in the indictment" (R. 4366). Moncharsh could hardly complain of this charge, as indeed he does not, since it appears to be more favorable to him than might properly have been given. Indeed, the instructions given here by the trial court were substantially identical with those requested by the defendants. Compare Requested Instructions 107 and 109 (R. 137–138) with R. 4366. And, as has been shown, the evidence fully warranted the verdict of guilt reached by the jury in accordance with these instructions.

Moreover, Moncharsh's guilt as an aider and abettor is supported by the overwhelming evidence that the substantive offenses were committed in furtherance of the conspiracy to defraud the United States—the conspiracy of which

the proof established him to be the leading member. The jury could properly consider Moncharsh's participation in the conspiracy as evidence of aiding and abetting the substantive offenses. *Pinkerton* v. *United States,* 328 U. S. 640. That case, the application of which we shall also discuss in Point B, *infra,* differs from this case in that Daniel Pinkerton, whose conviction on the substantive offenses was upheld even though there was no evidence to show that he participated directly in their commission, was not indicted as an aider and abettor, and his case was not submitted to the jury on that theory (328 U. S. at 645–646, footnote 6). However, in reaching its conclusion that Daniel could be held on the principle that each member of an unlawful conspiracy is liable for the substantive offenses committed by his co-conspirators in furtherance of the conspiracy, the Court held that a "conspiracy is a partnership in crime"; that "so long as the partnership in crime continues, the partners act for each other in carrying it forward"; and that "[e]ach conspirator instigated the commission of the crime" (pp. 644, 646, 647).

It would seem clear, therefore, that the *Pinkerton* case, in addition to establishing a substantive principle of criminal liability for acts committed in furtherance of a conspiracy, also recognized a rule of evidence, namely, that participation in a conspiracy, in the furtherance of which sub-

stantive offenses are committed, may properly be considered by the jury as evidence of aiding and abetting the commission of such offenses. Daniel Pinkerton relied on *United States* v. *Sall*, 116 F. 2d 745 (C. A. 3), where, like the present case, the issue of guilt on the substantive offenses had been submitted to the jury on the aider-and-abettor theory. The Court of Appeals in the *Sall* case held that the conviction of aiding and abetting could not be supported merely by evidence that the offense was committed in furtherance of a conspiracy in which the defendant participated; it held that evidence of direct participation in the commission of the substantive offense was necessary. But this holding was expressly disapproved in the *Pinkerton* opinion (328 U. S. at 646).

It is respectfully submitted, therefore, that Moncharsh was properly convicted as an aider and abettor in the commission of the substantive offenses.[10] The case was correctly submitted to the jury on that theory, and petitioners do not challenge the correctness of the instructions given by the trial court.[11] Nor is it denied here that

[10] It was not necessary that the indictment specifically allege that Moncharsh was an aider and abettor. *Jin Fuey Moy* v. *United States*, 254 U. S. 189, 192; *Melling* v. *United States*, 25 F. 2d 92 (C. A. 7); *O'Brien* v. *United States*, 25 F. 2d 90 (C. A. 7); *Collins* v. *United States*, 20 F. 2d 574 (C. A. 8).

[11] That the jury was explicitly informed that Moncharsh's guilt on the substantive counts depended on a finding that he aided and abetted the crimes charged, is shown not only by

the evidence amply warranted the jury in finding Moncharsh's co-defendants, the corporation and the other employees who were his subordinates, criminally liable for the submission of the false vouchers. The only contention which Moncharsh

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the trial court's instructions but also the summations of Government counsel. Mr. Houck argued as follows (R. 4503):

"* * * There is no doubt that Berman caused his claims to be made and Goddard caused his, so, presumably, the only question in this case is, did Menges and did Moncharsh have any part in these claims. Moncharsh was the president, he was the director of the business policies. Whenever he was in town he was there at the plant; Mr. McKenna so testified. He kept a close touch on the business affairs of the company and under those circumstances, isn't it self-evident that he originated or was responsible for all of these fictitious practices, and he was the one who was the guiding spirit? He it was who surrounded himself with these subordinates who would carry out his plans. Under those circumstances there can be no doubt that Moncharsh is equally guilty with Berman and is equally guilty with Goddard."

The other Government counsel, Mr. Pratt, also argued the issue of Moncharsh's liability on the substantive counts, as follows (R. 4577–4578):

"Now, what is the responsibility of the other defendants than Berman and Goddard in connection with these particular counts? It is this: As far as the corporation is concerned, as was said to you yesterday by Mr. Houck, a corporation can act only through its officers and representatives. The pattern of this company's business was dictated by Abraham Moncharsh. There cannot be any question of that.

"As far as Menges is concerned, his duties related to the candling room. He was there for years and years. He knew the manner in which this business was being conducted in an improper way. He knew that Small eggs, Peewee eggs, cases of them were put over by Ruby Goddard's office. He knew the manner in which business was being conducted in that concern, and the law is that anyone

makes, on this phase of the case, is that the Government's proof did not link him with these admittedly criminal acts committed by the other defendants. But, as we have shown, the proof established two clear and substantial links connecting him with these acts and making him criminally responsible for them: (1) his responsible role in the conduct of the affairs of the corporation for whose benefit these crimes were committed; and (2) his active participation as the leader in the over-all conspiracy, in furtherance of which the jury could certainly infer these substantive offenses were committed. Accordingly, the judgment of conviction entered against Moncharsh on the substantive counts by the district court was entirely correct, and was entitled to the affirmance which it received from the Court of Appeals.

B. THE GROUNDS UPON WHICH THE COURT OF APPEALS BASED ITS AFFIRMANCE OF MONCHARSH'S CONVICTION ON THE SUBSTANTIVE COUNTS

Petitioner Moncharsh's principal contention is that his conviction on the substantive counts was affirmed by the Court of Appeals on grounds involving an erroneous application of *Pinkerton* v. *United States*, 328 U. S. 640. In particular, he

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who aids and abets the commission of an offense becomes a principal and is equally liable with any who actually perform the unlawful acts. Moncharsh is criminally responsible because he aids and abets everything that went on in that plant. He knew the pattern. He knew the course of conduct that was pursued, and the same is true of Menges."

contends that, unlike the *Pinkerton* case, the substantive counts were left to the jury here solely on the aider-and-abettor theory, and not in terms of guilt based on alleged participation in a conspiracy; that the Court of Appeals erred in failing to consider Moncharsh's conviction of the substantive offenses on the same basis on which they were submitted to the jury, and that it did not, on its review of the evidence, decide whether the proof was sufficient to support the conviction on the aider-and-abettor theory; and that the Court of Appeals found merely that there was evidence that Moncharsh participated in a conspiracy in furtherance of which the substantive offenses were committed by his co-conspirators, and therefore upheld his conviction under the substantive rule of criminal liability established by the *Pinkerton* case, disregarding the fact that the case was not submitted to the jury on that theory.

It must be admitted that the opinion below is not entirely clear as to the basis on which the Court of Appeals rested its affirmance of Moncharsh's conviction on the substantive counts. As petitioner Moncharsh and the Government both agree, the issue before the court below, on this phase of the case, was whether the evidence was sufficient to support his conviction as an aider and abettor. If, as he contends, the Court of Appeals did not in fact consider and pass upon this issue, and instead upheld the conviction

solely on the basis of a mechanical application of the *Pinkerton* rule of substantive liability, we would agree that this was a doubtful ground for affirmance, since the trial judge did not frame his charge in terms of that rule.[12] Cf. Note, 56 Yale L. J. 371, 376; *Bollenbach* v. *United States*, 326 U. S. 607, 613. On the other hand, if, as we believe, the court below relied upon the *Pinkerton* case only as showing that participation in a conspiracy may be considered as *evidence* of aiding and abetting the commission of offenses committed in furtherance of the conspiracy, its reliance on the *Pinkerton* case was wholly proper. As we have shown (*supra*, pp. 48–50), the *Pinkerton* case recognizes not only a principle of criminal liability but also a rule of evidence which permits aiding and abetting to be shown by evidence of participation in a conspiracy.

In rejecting Moncharsh's contention that the evidence did not support a finding of his guilt on the substantive counts, the Court of Appeals recognized that the case was submitted to the jury on the aider-and-abettor theory (R. 4617), and stated that it was "of the opinion that the verdict of the jury on the substantive counts did not disregard or go beyond the scope of the instructions given. Appellants' contention to the contrary is

[12] It should be noted that the *Pinkerton* case had not yet been decided by this Court when the jury was instructed. The instructions were given on April 6, 1946 (R. 4356), and *Pinkerton* was decided June 10, 1946 (328 U. S. 640).

answered by the *Pinkerton* case itself" (R. 4618).

After quoting from this Court's opinion in the *Pinkerton* case (particularly, from the middle of the paragraph on 328 U. S. 647), the court below referred to the dictionary definition of "instigate", and pointed out that one of its synonyms is "abet" (R. 4619). The court then stated: "Evidence that a defendant was associated with others in a conspiracy was held sufficient to sustain a finding that defendant aided or abetted the acts committed in furtherance of the conspiracy by this court in *Johnson* v. *United States* (C. C. A. 9), 62 F. 2d 32, 34, a case relied upon by the Supreme Court in *Pinkerton* v. *United States*. The same result should be reached here." (*Ibid.*)

Later in its opinion, in rejecting Moncharsli's contention that the prior similar offenses could not be considered as evidence of his guilt on the substantive counts (discussed *infra*, pp. 57–60), the court below stated: "This contention ignores the evidence indicating that Moncharsh participated in a conspiracy, in furtherance of which the acts charged in the substantive counts and the prior offenses were committed. This evidence establishes Moncharsh as an instigator of such acts and offenses, which thereby became admissible against him in determining his guilt under the substantive counts. *Pinkerton* v. *United States*, 328 U. S. 640." (R. 4627–4628.)

It would seem, therefore, although the matter is not entirely free from doubt, that the court below relied upon *Pinkerton* only in so far as that case recognized a rule of evidence permitting the jury to infer aiding-and-abetting from proof of participation in a conspiracy in furtherance of which substantive crimes are committed.

In any event, the Government is entitled to urge that the judgment of conviction on the substantive counts was properly entered in the district court and that it should be sustained by this Court, notwithstanding that it may have been affirmed by the court below on an erroneous or doubtful ground. *Helvering* v. *Gowran*, 302 U. S. 238, 245–246; *Walling* v. *General Industries Co.*, 330 U. S. 545, 547, and cases cited. The Government respectfully submits that it would be in the interests of a prompt and just termination of the case for the Court to review the sufficiency of the aiding-and-abetting evidence to support Moncharsh's conviction on the substantive counts, even though it may conclude that there are doubts as to whether the Court of Appeals squarely passed upon this issue. The evidence as to Moncharsh's responsible role in the operations of Nye & Nissen, and as to his participation in the conspiracy to defraud the United States in furtherance of which the substantive offenses were committed, is clear and overwhelming. Review of this evidence would not require a scrutiny of the entire record, but merely of those portions summarized in the

Statement (*supra*, pp. 7–20). At this juncture of the case, the Government is not required to show that the evidence in its entirety compelled the jury to find Moncharsh guilty as an aider and abettor; it suffices to show that evidence was presented from which the jury could properly have drawn such an inference.

II

THE TRIAL COURT DID NOT ERR IN PERMITTING THE JURY TO CONSIDER, AS EVIDENCE OF THE CRIMINAL INTENT WITH WHICH THE OFFENSES CHARGED IN THE SUBSTANTIVE COUNTS WERE COMMITTED, PROOF OF SIMILAR OFFENSES OCCURRING AT ABOUT THE SAME TIME AND SHOWING A CONSISTENT PATTERN OF CONDUCT

As pointed out in the Statement, *supra*, pp. 27–29, the Government adduced evidence that during the same April-May period in 1944 in which the six false invoices charged in the substantive counts were presented to the War Shipping Administration, Nye & Nissen presented nine other false invoices to that agency of the Government in connection with sales of products to other ships than those to which the deliveries involved in the substantive counts were made. There was also proof of presentation of two similar false invoices, one in October 1943, and the other in December 1944. Proof of the presentation of these eleven additional false invoices was received at the trial as evidence of the conspiracy charged

in the first count and as overt acts committed in furtherance of the conspiracy. After both the prosecution and the defense had rested, however, the trial court granted a motion made by the Government to admit the proof of ten of these additional offenses (the December 1944 offense being excluded for the reasons stated in note 7, *supra*, p. 28) as evidence relating to the substantive counts of the indictment as well, on the theory that they were similar offenses tending to show the criminal intent with which the particular false invoices involved in those counts were presented (R. 3342–3343, 4354–4355). The trial court instructed the jury on the relevance of this evidence, as follows (R. 4377):

> Testimony has been introduced by the prosecution which it is claimed tends to show the commission of other acts or offenses by the defendant similar to that charged in the indictment. I charge you that this evidence was admitted for the sole purpose of proving guilty intent, motive, or guilty knowledge of the defendant, and that it can be considered by you for no other purpose.

Petitioner Moncharsh argues that the trial court erred in admitting evidence of these similar offenses, as bearing on the intent with which he committed the substantive offenses charged in the indictment, "for the reason that there was no evidence in the record connecting him with the commission of either set of offenses" (Br. 33).

The fallacy of this argument lies in its premise. It assumes that there was no evidence that Moncharsh aided and abetted the commission of the substantive offenses. If we are correct in our argument in Point I, *supra*, pp. 33–52, that the evidence adduced at the trial was sufficient to justify the finding, implicit in the verdict, that Moncharsh was an aider and abettor of the substantive crimes, his contention here must fail. The action of the trial judge in granting the Government's motion and instructing the jury that the evidence of the other, similar offenses was admitted for the purpose of showing "guilty intent, motive, or guilty knowledge" in respect of the substantive offenses charged (R. 4377) was clearly proper. For it is well settled that evidence of offenses other than, but similar to, those charged in the indictment is admissible to show the criminal intent, motive, or guilty knowledge with which the offenses charged were committed, or to show a design or consistent pattern of conduct in connection with which the offenses charged were committed. *Weiss* v. *United States*, 122 F. 2d 675, 681–685 (C. A. 5), certiorari denied, 314 U. S. 687, and authorities there cited; cf. *Rex* v. *Sims*, [1946] 1 K. B. 531, 537; *Makin* v. *Attorney General for New South Wales*, [1894] A. C. 57, 65. 2 Wigmore, *Evidence* (3d ed., 1940), §§ 300–306; 1 Wharton, *Criminal Evidence* (11th ed., 1935), §§ 223, 345–354.

Petitioners' brief on the merits also contains

an argument (pp. 35–39) that the instruction given by the trial court on this point, quoted above, was "terse and cryptic" and prejudicially erroneous. However, this question was neither presented in the petition for certiorari (pp. 2–3) nor assigned as error therein (p. 11). Nor does it appear from the record that the defendants requested any instruction on this point which was less "terse and cryptic" (see R. 102–145). In any event, the instruction adequately apprised the jury of the limited relevance of this evidence, and certainly does not involve prejudicial error.

III

THERE IS NO VARIANCE BETWEEN THE ALLEGATIONS AND THE PROOF IN RESPECT OF THE CONSPIRACY COUNT

Petitioner Moncharsh contends (Br. 39–46) that there was a variance, prejudicial to him, between the conspiracy charged in the indictment and the proof adduced at the trial. It is argued that while the indictment charged a single, continuing conspiracy beginning in 1938 and lasting until 1945, the Government's proof showed two separate and distinct conspiracies of different character and involving different persons. The first, it is contended, "embraced Berman, Goddard, Moncharsh and Menges in an unlawful agreement to defraud the United States by impeding and impairing the government's inspection system with relation to sales of eggs to the

Army and Navy from 1938 to 1942 inclusive" (Br. 43); the second "embraced Berman and Goddard alone in an unlawful agreement to commit offenses against the United States, namely, the filing of false vouchers with the War Shipping Administration, commencing in November 1943 to and including 1944" (*ibid.*). And it is claimed that Moncharsh was prejudiced in that the "jury may well have convicted him on the conspiracy count solely on the evidence relating to the deliveries of inferior merchandise to the War Shipping Administration vessels in 1943 and 1944 with which Moncharsh was not shown to be connected or implicated" (Br. 43).

This argument is entirely without merit. Even on the assumption that a variance existed, no showing of prejudice is made. A variance is not fatal unless it affects substantial rights of the accused or creates confusion at the trial (*Kotteakos* v. *United States*, 328 U. S. 750, 757; *Berger* v. *United States*, 295 U. S. 78, 82)—neither of which is shown to have occurred here. Moncharsh speculates that the jury may have convicted him because of the evidence relating to the 1943 and 1944 deliveries. There is no reason to assume, however, that he was not convicted on all the evidence, particularly that establishing his managerial position in Nye & Nissen and his active complicity in the frauds relating to evasion of the governmental inspection systems.

But, in any event, we agree with the conclusion of both courts below that no variance existed between the allegations and the proof. The indictment specifically charged a single conspiracy "to defraud the United States" (R. 4). It alleged that the conspiracy involved various types of fraudulent activities: grading and selling to agencies of the Government inferior products through frauds and deceptions practiced upon its inspectors and representatives; impeding and defeating the lawful functions of Government agencies in the inspection, grading, weighing, and purchase of butter, cheese, and eggs; and circumventing and avoiding the standards, grades, weights, and specifications to which these purchases were subject, by various specified tricks and schemes (R. 4–5). The indictment alleged, further, that it was "a part of the plan and conspiracy" that the defendants would misrepresent the grade, weight, and price of eggs, butter, and cheese, sold to the War Department and the War Shipping Administration (R. 5, 7–8).

These allegations as to the specific methods whereby the conspiracy was, and was intended to be, carried out were sustained by the proof, which showed the existence of a single conspiracy which continued throughout the period alleged in the indictment, and the case was submitted to the jury on the basis of a single conspiracy (R. 4359–4365). Cf. *Braverman* v. *United States*, 317 U. S. 49; *United States* v. *Kissel*, 218 U. S. 601,

607. As we have already indicated (*supra*, pp. 41–44), it is without significance that the evidence relating to the frauds on the inspection systems of the Army and Navy pertained principally to the year 1942 and earlier,[*] while that relating to the fraudulent invoices presented to the War Shipping Administration pertained to the year 1943 and later. Moncharsh's contention is, in essence, that, beginning in 1943, Berman and Goddard, who were his brothers-in-law as well as his subordinates in the plant, started a conspiracy of their own,

[*] There is no reason to suppose, however, that the frauds of this character suddenly ceased in 1942. The principal Government witnesses who testified to frauds of this type, former employees of Nye & Nissen, discontinued their employment at about that time or earlier. Pineda left in October 1942, except for about five weeks in February and March of 1943 (R. 444–445), and Andrade left in 1940 (R. 3219).

Furthermore, there was evidence that during the period in 1943 and 1944 when Nye & Nissen was making deliveries of eggs and other products to vessels operated under contracts with the War Shipping Administration, Berman and Goddard were still engaging in fraudulent activities of the same general character as the frauds on the inspection systems of the Army and Navy shown to have been perpetrated from 1938 to 1942. These activities consisted of mixing unstamped (i. e., unapproved by the Department of Agriculture) cases containing substandard eggs with stamped eggs and placing the mixed lots on the piers for delivery to the various ships. See pp. 18–19, *supra*. The obvious purpose of these activities was to pass inferior eggs along with those which had received the stamp of approval, and the practical consequences of this mode of deceit were, of course, precisely the same as those flowing from the deceitful practice of inducing government inspectors to stamp cases of substandard eggs as approved, viz, foisting inferior eggs on the Government and receiving payment for approved eggs.

to which Moncharsh was not a party, even though he and the corporation were its principal beneficiaries. It is argued, in other words, that Berman and Goddard went off on a "separate and distinct" conspiratorial frolic of their own which, by a coincidence, had as its object the unlawful enrichment not of themselves but of Nye & Nissen and Moncharsh—who were entirely innocent of participation in such conspiracy.

The Court of Appeals properly rejected this argument (R. 4615):

> * * * though the character of the acts shown by the proof may have been somewhat different after 1943, it is scarcely conceivable that any of the acts were done with any purpose in view other than that of deceiving the government as to the inferior quality of eggs being sold to its agencies by Nye & Nissen. Such an inference flows quite as naturally from the evidence concerning defendants' circumvention of the inspection system as it does from the evidence concerning the false invoices covering the deliveries to the War Shipping Administration. All misconduct of defendants was germane to one consistent and persistent course of wrongdoing. * * *[11]

[11] Petitioners also argue, in their brief on the merits (pp. 44–46), that the trial court erroneously admitted certain evidence concerning the condition of eggs at various times after delivery. This question was not raised in the petition for certiorari (pp. 2–3), and hence would not appear to be open

CONCLUSION

Petitioners were properly convicted on all counts; the trial court did not err in its instructions to the jury; and the evidence amply sustains the verdicts of guilt. The judgment of affirmance entered by the Court of Appeals, even though (in respect of Moncharsh's conviction on the substantive counts) it may possibly be regarded as resting on a doubtful ground, is amply supported on proper grounds, and should therefore be sustained.[15]

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here. In any event, it has no merit. As the court below observed (R. 4620), petitioners' objections to this evidence go to its probative value rather than its admissibility; and such weakness as the evidence may have had was earnestly pressed upon the jury by defendants' counsel (see R. 4534–4541, 4542–4545, *passim*).

[15] Neither the petition for certiorari nor petitioners' brief on the merits appears to raise any substantial question as to the validity of the conviction of Nye & Nissen, the corporate petitioner, on all counts. The trial court properly instructed the jury that "being a corporation [Nye & Nissen] is criminally responsible for the acts of its officers or agents performed within the scope of their authority and for and on behalf of the company. Conversely, it is not responsible for the acts of its officers or agents committed for their personal benefit or performed outside the scope of their authority." (R. 4358.)

This instruction, the correctness of which petitioners do not question, was an apt statement of the applicable rule of liability. *N. Y. Central & Hudson River R. R. Co.* v. *United States*, 212 U. S. 481; *United States* v. *Dotterweich*, 320 U. S. 277, 281; *United States* v. *George F. Fish, Inc.*, 154 F. 2d 798 (C. A. 2), certiorari denied, 328 U. S. 869; *Director of Public Prosecutions* v. *Kent & Sussex Contractors, Ltd.*, [1944] 1 K. B. 146; Edgerton, *Corporate Crim-*

Respectfully submitted.

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inal Responsibility, 36 Yale L. J. 827. Apart from its responsibility for Moncharsh's acts, Nye & Nissen does not deny its corporate criminal liability for the offenses committed by the other employee-defendants, Berman and Goddard, the validity of whose convictions on all counts is not here challenged.

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